

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC

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Federal Communications Commission  
Office of Secretary

In the Matter of )

Annual Assessment of the Status of )  
Competition in the Market for the )  
Delivery of Video Programming )

CS Docket No. 96-133

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REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

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**REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.**

Tele-Communications, Inc. ("TCI") hereby files these  
Reply Comments in the above captioned proceeding.<sup>1</sup>

**I. INTRODUCTION**

Congress enacted Section 628(g) of the Communications Act to provide the Commission with a mechanism to generate technical, marketing, economic, and other data which would allow the Commission to report to Congress on "the status of competition in the market for the delivery of video programming."<sup>2</sup> However, for some non-cable MVPDs this proceeding has become an annual ritual in which they attempt to exploit the Commission's processes in

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<sup>1</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, CS Docket No. 96-133, FCC 96-265 (released June 13, 1996) ("Notice").

<sup>2</sup> 47 U.S.C. § 548(g).

the hopes of deriving a competitive advantage through further regulation of the cable industry.

Complaints by non-cable MVPDs that they cannot compete effectively without more government-sponsored handicapping stand in stark contrast to their recent advances in the marketplace. For example, Direct-to-Home satellite services added 2.245 million new subscribers in the last year (from 3.22 million to 5.465 million), a growth rate of 69.7 percent.<sup>3</sup> Most of this growth is attributable to DBS, which has maintained its position as the "fastest growing consumer electronic startup ever," closing June 1996 with 2.95 million subscribers.<sup>4</sup> Most recently, EchoStar introduced consumers to yet another DBS option -- the DISH network -- which currently attracts about 1,500 new subscribers per day.<sup>5</sup> By the end of 1996, experts predict DBS will have acquired 6.25 million subscribers, up more than 200 percent from last year's 2.86 million.<sup>6</sup>

Moreover, the substantial success of Direct-to-Home satellite services is merely the most prominent example of the

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<sup>3</sup> See Comments of Satellite Broadcasting and Communications Association of America at 7.

<sup>4</sup> Communications Daily, July 15, 1996, p. 10 (quoting the Satellite Broadcasting and Communications Association of America).

<sup>5</sup> See "Dishing Up a DBS Warning," Broadcasting & Cable, July 8, 1996, p. 33.

<sup>6</sup> See "Bad News and Good News for DBS," Broadcasting & Cable, June 24, 1996, p. 52.

many MVPD alternatives currently being offered to subscribers. Cable continues to face increasing competition from wireless cable and SMATV operators, especially for lucrative MDU and commercial service contracts. Competition from MMDS operators is expected to intensify still further now that digital MMDS is both technically possible and approved by the Commission.<sup>7</sup> Perhaps most notably, the Telecommunications Act of 1996<sup>8</sup> has authorized telcos to provide video programming directly to subscribers in their telephone service areas.<sup>9</sup> Telcos have already begun to pursue this new video opportunity through a two-pronged strategy of MMDS and fiber-coax overbuilds.<sup>10</sup> Undoubtedly, the sophisticated and well-financed nature of telcos will serve them

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<sup>7</sup> See Request For Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, Declaratory Ruling and Order, FCC 96-304, ¶ 5 (released July 10, 1996) (noting that the introduction of digital technology in wireless cable service will greatly enhance the present level of service and exert a major influence on the structure of the MVPD market).

<sup>8</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

<sup>9</sup> See 1996 Act, § 302.

<sup>10</sup> For example, PacTel, Bell Atlantic and NYNEX plan to provide MVPD service in competition with cable operators within the year. See "PacTel Sees Video's Future as Wireless," Broadcasting and Cable, July 8, 1996, p.36; "BA, NYNEX Moving to Digital Wireless," Broadcasting and Cable, July 8, 1996, p.38. Moreover, many telcos, including Ameritech, BellSouth, SNET, PacTel, and SWB, have obtained cable franchises. Similarly, US West has been aggressively buying existing cable companies.

well in placing additional competitive pressures on cable operators.<sup>11</sup>

In short, virtually all consumers in America now have a choice of MVPDs from which they may obtain video programming. The fact that many consumers choose cable over other MVPDs does not mean that the marketplace is not competitive. It simply means that many consumers perceive cable to offer a better value. That is not surprising in light of the cable industry's investment of billions of dollars in distribution facilities, diverse programming, and customer service. So long as consumers have a choice, the exercising of that choice to select a particular product does not constitute proof of a failed federal policy. To the contrary, it is evidence of the marketplace functioning efficiently. Stated another way, just because the famous racehorse Cigar won 16 races in a row, it does not mean that the races were fixed or that he should be forced to run with only three legs. Likewise, the fact that many consumers deem

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<sup>11</sup> Indeed, the sponsors of both the House and Senate versions of the telecommunications bill noted that allowing telephone companies to offer video programming in their service areas will have an immediate competitive effect on cable operators. Statement of Rep. Bliley, 142 Cong. Rec. H1145, H1159 (Feb. 1, 1996) (allowing telco entry will result in "bringing genuine competition to the cable market."); Statement Sen. Pressler, 141 Cong. Rec. S8243 (daily ed. June 13, 1995) ("telephone companies pose a very credible competitive threat [to cable] because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and ... their financial strength and staying power.").

cable to be the best value among the many comparable video alternatives available to them doesn't mean that government intervention is required to tilt the regulatory landscape still further in favor of non-cable MVPDs.

In these reply comments, TCI responds to the self-serving proposals by certain non-cable MVPDs who seek to impose further unjustified burdens on the cable industry for their own competitive benefit. In particular, TCI addresses comments filed by DIRECTV, the National Rural Telecommunications Cooperative ("NRTC") and Optel.

**II. THE COMMISSION SHOULD REJECT, AS CONTRARY TO THE PUBLIC INTEREST, THE SELF-SERVING REQUESTS OF NON-CABLE MVPDS FOR SPECIAL COMPETITIVE PRIVILEGES**

**A. Response To DIRECTV And NRTC's Proposal To Prohibit Cable Participation In The DBS Industry.**

DIRECTV and NRTC (an exclusive distributor of DIRECTV services within its member service areas) propose that the Commission prevent or severely restrict the provision of DBS service by cable-affiliated entities.<sup>12</sup> Specifically, these commenters attack: (1) the efforts of TCI to obtain U.S. DBS authorization so that it may combine the operations of PRIMESTAR, a medium-powered Direct-to-Home entity partly owned by TCI, with high-power DBS service; and (2) a proposal of Western Telecommunications, Inc. ("WTCI") to take advantage of Canadian DBS

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<sup>12</sup> DIRECTV Comments at 2-3; NRTC Comments at 5-8.

orbital slots that would result in the introduction of two new full-CONUS DBS competitors within months. DIRECTV and NRTC base their opposition to such cable-affiliated ventures not on analytical or empirical support but on the previously discredited assertion that a cable-affiliated DBS provider, such as TCI or PRIMESTAR, lacks the incentive to develop fully as a competitive business and instead will merely take up valuable DBS spectrum in order to prevent other operators from using it to attract cable subscribers.

In so stating, DIRECTV and NRTC are repeating the exact same arguments for excluding cable from the DBS industry that the Commission has repeatedly rejected as contrary to competitive and public policy interests.<sup>13</sup> Only eight months ago, the Commission expressly "recognized that cable-affiliated MVPDs bring certain positive attributes as DBS permittees."<sup>14</sup> The Commission specifically found a cross-ownership restriction was unnecessary because the presence of independent DBS providers "severely constrains the strategic activities of an MVPD-DBS

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<sup>13</sup> The Commission concluded several years ago that cable-affiliated participation in DBS could benefit the industry and that burdensome restrictions would not serve the public interest. See Continental Satellite Corp., Memorandum Opinion and Order, 4 F.C.C.R. 6292, 6299 (1989); TEMPO Satellite, Inc., Memorandum Opinion and Order, 7 F.C.C.R. 2728 (1992).

<sup>14</sup> Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, 1 Comm. Reg. (P & F) 928, ¶ 73 (1995) (citation omitted).



combination."<sup>15</sup> Moreover, the Commission thoroughly considered and properly rejected calls by DIRECTV and other parties to impose onerous restrictions on cable-affiliated DBS providers.<sup>16</sup> Neither DIRECTV nor NRTC offers any reason why the Commission should reconsider these prior decisions.

To the contrary, significant developments in the MVPD competitive landscape confirm the correctness of the Commission's previous findings. As the Commission predicted, the DBS industry has continued to grow in size and number. EchoStar is now providing full-CONUS service to U.S. subscribers.<sup>17</sup> In addition, MCI Telecommunications Corporation ("MCI"), in conjunction with Fox Newscorp, has acquired the rights to provide yet another full-CONUS DBS service, which it has said will commence in the first half of 1998.<sup>18</sup> Meanwhile, DIRECTV has continued to expand its market share, offering service to approximately 1.6 million subscribers. DIRECTV also is developing new service offerings through partnerships with AT&T and Microsoft Corporation.<sup>19</sup> In this context, the addition of a cable-affiliated DBS competitor

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<sup>15</sup> Id. at ¶ 73.

<sup>16</sup> See Continental Satellite Corp., 4 F.C.C.R. at 6299; TEMPO Satellite, Inc., 7 F.C.C.R. at 2728.

<sup>17</sup> See Jon Rappoport, "DISH Beams Into Direct Satellite TV Service," Advertising Age, May 6, 1996, p. 14.

<sup>18</sup> See Application of MCI Telecommunications Corporation for an Initial System Construction and Launch Authorization in the DBS Service, FCC File No. 73-SAT-P-96 (April 15, 1996), at 7.

<sup>19</sup> DIRECTV Comments at 4-5.

would only help to further diversify the concentration of full-CONUS frequencies serving the United States and increase DBS competition.

In addition, there is and always has been a fundamental logical flaw in the DIRECTV-NRTC claim that cable-affiliated DBS operators would lack an incentive to compete: Even assuming, arguendo, that a cable-affiliated DBS provider, such as PRIMESTAR, failed to compete aggressively for DBS subscribers, the affiliated cable systems would merely cede market share to the other DBS providers and to new entrants in the MVPD marketplace. In that case, DIRECTV and NRTC would have no reason to oppose the participation of cable-affiliated entities in the DBS market since such participation would be in their own economic interest. Thus, the more likely explanation for DIRECTV and NRTC's continued opposition is that the DBS services proposed by TCI and PRIMESTAR are pro-competitive and that DIRECTV and NRTC merely desire to shield themselves from further direct competition.<sup>20</sup>

Moreover, in asserting that a cable-affiliated entity lacks the incentive to compete, DIRECTV and NRTC fail to explain why TCI would invest hundreds of millions of dollars in DBS ventures

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<sup>20</sup> This "competition is great as long as I am the beneficiary" attitude is further demonstrated by DIRECTV and NRTC's apparent belief in their right to access cable programming and compete for cable subscribers as an inviolate principle, even as they are at the same time seeking government-backed insulation from competitive threats to their own business.

if it did not intend to compete vigorously. For example, in addition to TCI's substantial holding in PRIMESTAR, TCI's commitment to becoming a viable and competitive DBS provider has been amply demonstrated by its attempts to secure two Canadian DBS orbital slots that would be used to launch new full-CONUS DBS services.<sup>21</sup> The simple fact is that, because of competition from other DBS providers, MMDS operators, cable operators, and impending video service from telephone companies, a cable-affiliated DBS provider would risk failure of its DBS system, and loss of its significant sunk costs, unless it competed vigorously for subscribers.

Marketplace facts also refute DIRECTV and NRTC's claims. For example, the growth of PRIMESTAR clearly demonstrates the intent and incentive of cable-affiliated entities to compete in the DBS business. As reported in its comments, PRIMESTAR's service has grown to more than 1.2 million subscribers, in spite of its unsuccessful attempts to migrate to high power service.<sup>22</sup> In fact, vigorous competition from PRIMESTAR, which was the first

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<sup>21</sup> On March 26, 1996, WTCI filed an application with the Commission requesting authority to uplink U.S. programming to transponders that it will own on a satellite located in a Canadian orbital slot (82°W) for service to consumers in the United States. See FCC File No. 844-DSE-P/L-96. If approved, the proposal ultimately will lead to the delivery of DBS service to U.S. consumers from a second Canadian slot and will increase by two-thirds the number of slots from which full-CONUS DBS service can be provided.

<sup>22</sup> PRIMESTAR Comments at 3.

to offer consumers a lease option for DBS equipment, forced DIRECTV to introduce similar financing packages for their DBS offerings, thereby lowering the consumer's initial cost.

Even TCI's potential DBS competitor, MCI, which has strongly opposed TCI's efforts to initiate a DBS service, recently acknowledged the effective competition that TCI would bring to DBS. In a brief to the Court of Appeals for the District of Columbia Circuit, MCI argued that TCI has every incentive to compete vigorously in the DBS industry:

Full-CONUS DBS providers compete nationwide, but the largest cable company (TCI) reaches only about 13% of U.S. television households. Any cable affiliate that won the auction [of DBS frequencies at 110°W] would have an incentive to compete for all of the American households outside its cable service area and would have the same incentive with respect to the several million households that do not have access to cable.<sup>23</sup>

Finally, DIRECTV and NRTC's proposal to erect barriers to entry to the DBS industry is squarely at odds with the deregulatory thrust of the 1996 Act. Throughout the 1996 Act, Congress emphasized its desire to tear down barriers to entry in the MVPD marketplace. Consequently, it eliminated the historical restrictions on the ability of telephone companies to provide video services in their home markets.<sup>24</sup> It also removed or substantially relaxed other media ownership restrictions,

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<sup>23</sup> DIRECTV, Inc. et al. v. Federal Communications Commission, et al., Docket Nos. 96-1001 (and consolidated cases), Initial Brief of Intervenor, filed July 26, 1996, at 32-33.

<sup>24</sup> 1996 Act, § 302(b)(1).

including the statutory television network/cable and broadcast/cable cross-ownership bans, and national and local broadcast restrictions.<sup>25</sup> DIRECTV and NRTC's request that the Commission turn against the tide of these congressional directives by erecting yet another unnecessary entry barrier further exposes that request as little more than a self-serving attempt to prevent potential competitors from entering the DBS business and threatening their respective market shares.

**B. Response To NRTC's Request To Prohibit Exclusive Agreements Between Cable-Affiliated Programmers And Non-Cable MVPDs.**

NRTC also asks that the Commission ignore the clear limits of the program access rules in order to prohibit exclusive programming arrangements between cable-affiliated programmers and non-cable MVPDs.<sup>26</sup> Specifically, NRTC claims that exclusive contracts between cable-affiliated programmers and DBS operators have inhibited NRTC's ability to compete effectively.<sup>27</sup>

Like NRTC's request for a cable-DBS cross-ownership restriction, this argument is one which NRTC previously presented to the Commission and which the Commission soundly rejected.<sup>28</sup>

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<sup>25</sup> Id., §§ 202(f)(1) and (i)(1).

<sup>26</sup> NRTC Comments at 3-4.

<sup>27</sup> Id.

<sup>28</sup> See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and

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In doing so, the Commission recognized that the program access statute focuses on exclusive agreements between vertically integrated satellite cable programmers and cable operators and that program exclusivity can lead to numerous benefits, especially in the growing DBS market.<sup>29</sup> NRTC offers no new justification for disrupting this Commission decision. On this basis alone, NRTC's argument for broader application of the program access rules should be disregarded.<sup>30</sup>

In addition, NRTC's request can only be properly understood in the context of NRTC's own exclusive arrangements. As noted above, NRTC currently has the exclusive right to distribute DIRECTV programming in its service areas. However, having secured the benefits of exclusivity for itself, NRTC now seeks to prohibit its competitors from obtaining program exclusivity. Exclusive contracts are just fine with NRTC, it seems, as long as they work solely for the benefit of NRTC.

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Carriage, Memorandum Opinion and Order On Reconsideration of the First Report and Order, 10 F.C.C.R. 3105 (1994).

<sup>29</sup> Id. at ¶ 39 ("Such [exclusive] contracts may allow a distributor to distinguish its service from that of another, avoid duplication of programming, and eventually lead to more diversity in programming for the consumer.") (citation omitted).

<sup>30</sup> See Referral of Questions from General Communication Incorporated vs. Alascom, Inc., Memorandum Opinion and Order, 3 F.C.C.R. 700, ¶ 43 (1988) (a final agency decision should not be reopened absent a compelling showing that the controlling laws, policies, or circumstances have changed).

Ironically, despite its exclusive distributor status, NRTC has faltered in the marketplace due to its inefficient distribution practices.<sup>31</sup> Now NRTC is essentially asking the Commission to compensate for NRTC's own marketplace inadequacies by restricting the use of exclusive arrangements by its competitors. The Commission should waste no time in again rejecting NRTC's tired and self-serving request.

**C. Response To Optel's Request That The Commission Nullify Contracts Between Cable Operators And MDUs In Order To Allow Optel A Second Opportunity To Acquire These Subscribers.**

Like NRTC and DIRECTV, Optel also urges the Commission to adopt regulations that provide Optel with a special competitive advantage. Optel claims that it is hampered in its ability to compete in the MDU market by "perpetual" exclusive contracts between cable operators and MDUs.<sup>32</sup> Thus, Optel proposes that the Commission adopt a "fresh look" policy under which a private cable company, such as Optel, could trigger the reopening of all contracts between cable operators and MDUs in order to allow Optel another opportunity to compete for cable MDU subscribers.<sup>33</sup>

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<sup>31</sup> See, e.g., "Rural Americans want their DirecTv," Satellite Communications, March 1995, p.30 (noting some of the well documented marketing problems that NRTC has suffered, including massive customer waiting lists due to faulty distribution and the lack of a national marketing strategy).

<sup>32</sup> Optel Comments at 5-7.

<sup>33</sup> Id. at 7-9.

Optel's proposal is unsupported by marketplace facts and is wholly unjustified as a legal and policy matter. First, contrary to Optel's assertions, there is no such thing as a perpetual MDU contract. As with all contracts, the term of a cable operator -- MDU service agreement is the product of open negotiations between the parties. As Optel states,<sup>34</sup> this freely negotiated term is often for the life of the cable operator's franchise. However, contrary to Optel's assertion, a term for "the life of the franchise" does not include any renewals or extensions of that franchise. Rather, the MDU manager is free to renegotiate the cable service contract at the end of the existing franchise term.<sup>35</sup> The fact that MDU managers often choose to automatically renew their agreements with cable operators reflects their satisfaction with their cable service, rather than any coercion on the part of the cable operator.

Second, as both Congress and the Commission have recognized, the MDU marketplace is a uniquely dynamic environment in which

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<sup>34</sup> Id. at 7 ("Typically, the exclusive contracts used by franchised cable operators run for the term of their franchise and any renewals or extensions thereof. Because franchise renewals and extensions are all but automatic, the terms of these contracts are, for all practical purposes, perpetual.").

<sup>35</sup> In addition, such contracts may have a clause which provides for automatic renewal if neither party takes affirmative action. However, such a clause in no way prevents the MDU manager from exercising their express option to renegotiate or terminate the agreement.



the cable operator faces direct and vigorous competition.<sup>36</sup> Both MMDS and SMATV operators have long tailored their service offerings to MDU subscribers, engaging in highly aggressive marketing and pricing strategies designed to keep cable operators out of the MDU marketplace.<sup>37</sup> In addition, DBS operators have announced their own ambitious plans to enter the MDU market.<sup>38</sup> As a result, Congress specifically allowed cable operators greater pricing flexibility in order to meet the lower prices created by the high level of MDU competition.<sup>39</sup> In short, far from finding any competitive problem in the MDU marketplace caused by cable operator contracting practices, Congress found that cable operators need greater flexibility to compete in this vigorously competitive arena.

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<sup>36</sup> See, e.g., H.R. Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) (recognizing that discounted offerings to MDUs by cable operators is necessary due to the presence of other providers offering the same service); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration, 9 F.C.C.R. 4316, ¶ 20 (1995) (noting that competitors in the MDU market have become "important footholds for the establishment of competition to incumbent cable systems").

<sup>37</sup> See "Latest Battleground: Cable Fighting For MDUs," Multichannel News, July 17, 1995, p. 16.

<sup>38</sup> See "DBS Makers Target MDUs," Multichannel News, March 4, 1996, p. 5 (describing industry-wide DBS efforts to compete in the MDU market).

<sup>39</sup> See 47 U.S.C. § 623(d), amended by section 301(b)(2) of the 1996 Act.

Seen in this light, Optel's proposal amounts to little more than an audacious request that the Commission rig the bidding process in its favor. Under Optel's preferred scenario, Optel and a cable operator would bid for the right to serve an MDU, but if Optel bids too high and the cable operator wins the contract, Optel would have the Commission ignore this market result and nullify any contracts between the MDU owner and the cable operator so as to afford Optel a chance to bid again. In essence, Optel is asking the Commission to abandon reliance on market forces and delay service to subscribers for Optel's private benefit.<sup>40</sup> There is nothing in Title VI or in any of the Commission's prior decisions to suggest that the Commission could or should adopt such an extreme proposal.<sup>41</sup> Thus, Optel's

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<sup>40</sup> Optel operates SMATV systems all across the country, many of them located in areas where TCI provides cable service. TCI and Optel aggressively compete on a daily basis for contracts to serve MDUs. Sometimes TCI wins the contract, sometimes Optel does. Thus, it is not surprising that Optel would attempt to exploit the regulatory process to insulate itself from vigorous competition from TCI.

<sup>41</sup> While the Commission has adopted a "fresh look" policy in the past to revise existing contracts, those instances have always concerned the regulation of Title II common carriers and have been limited to situations where the contracts in question had been rendered unreasonable or illegal due to a change in regulatory policy. Thus, Optel's attempt to apply this policy outside of the Title II context to reasonable, freely negotiated contracts is both unjustified and entirely inappropriate. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, CC Docket Nos. 96-98 & 95-185, FCC 96-325, ¶ 1095 (released August 8, 1996) (finding that certain LEC-CMRS interconnection contracts violate Commission rules, and therefore allowing CMRS providers to revise such contracts in

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baseless plea for a "second chance" policy for MVPDs who are incapable of successfully competing in the marketplace without substantial regulatory handicapping must be disregarded.

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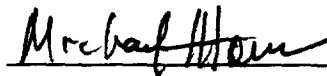
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order to implement the mutual compensation rules required by the 1996 Act); Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order on Recon., 7 F.C.C.R. 7369, 7463-7465 (1992) (imposing "fresh look" requirements in order to allow customers bound by long-term contracts to enforce the Commission's prescribed termination rates); Competition in the Interstate Interexchange Marketplace, Report and Order and NPRM, 7 F.C.C.R. 2677, 2681-82 (1992) (allowing a "fresh look" at any contracts which violated Commission rules by bundling 800 services with interexchange offerings).

### CONCLUSION

For the foregoing reasons, TCI respectfully requests the Commission to reject the arguments of DIRECTV, the National Rural Telecommunications Cooperative, and Optel and to remind all parties that the annual video competition inquiry is not the forum for leveling false accusations at cable operators or for seeking a competitive advantage through regulatory handicapping.

Respectfully submitted,  
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